CAN ONLINE TRIALS BE FAIR DURING THE COVID-19 PANDEMIC?

An Undergraduate Research Scholars Thesis

by

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Submitted to the LAUNCH: Undergraduate Research office at
Texas A&M University
in partial fulfillment of requirements for the designation as an

UNDERGRADUATE RESEARCH SCHOLAR

Approved by
Faculty Research Advisor: Dr. Linda Radzik

May 2021

Major: University Studies - Society, Ethics, and Law Concentration

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In the year 2020, the United States of America was ravaged by the global COVID-19 pandemic. However, even in a pandemic, crimes are committed, and people are imprisoned. The severely overloaded court system was forced to adapt and continue to adjudicate cases while navigating the challenges imposed by COVID-19. A widely adopted solution that appeared to mitigate the health risks of a highly transmittable disease was the use of Zoom, YouTube, and other video services to hold court and try cases.

However, this shift in court proceedings has revealed a plethora of concerns respecting the rights of those on trial, the state, victims, and more. At the forefront of this discussion is an overarching concern – can online trials be fair during the COVID-19 pandemic? This paper sets out to answer this question, or at least provide clarity and distinctions that will allow the reader to formulate their own opinions on issues with real life implications. To accomplish this task, several steps need to be taken.

First, the American standard of fair trials must be examined and analyzed. While there is no comprehensive list of standards, expectations and rights are enumerated within the Sixth

Amendment and other statutes. With the characteristics of a fair trial determined, sights are then set to detailing the health and societal concerns presented by COVID-19 and the reasons why online trials are being used to mitigate these risks. Finally, this wealth of information is combined and applied to answer the question – can online trials be fair during the COVID-19 pandemic?

ACKNOWLEDGEMENTS

Contributors

I would like to thank my faculty advisor, Dr. Linda Radzik, and my mentor, Shane Phelps, for their guidance and support throughout the course of this research.

Thanks also go to my friends and colleagues and the department faculty and staff for making my time at Texas A&M University a great experience.

Finally, thanks to my thesis meeting group for their encouragement and to my parents for their patience and love.

All work conducted for the thesis was completed by the student independently.

Funding Sources

No funding was received for this undergraduate thesis research project.

INTRODUCTION

In the year 2020, the United States of America was ravaged by the global COVID-19 pandemic. However, even in a pandemic, crimes are committed, and people are imprisoned. The severely overloaded court system was forced to adapt and continue to adjudicate cases while navigating the challenges imposed by COVID-19. A widely adopted solution that appeared to mitigate the health risks of a highly transmittable disease was the use of Zoom, YouTube, and other video services to hold court and try cases.

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1. WHAT IS A FAIR TRIAL?

Fully summarizing all elements of a fair trial is not the primary task of this paper. However, a broad understanding of what constitutes a fair criminal trial is critical to tackling the larger objective at hand. Specifically, this section will partially explore what exactly a fair trial is during criminal proceedings under the United States Constitution and in the state of Texas. It is evident that all parties involved in criminal trials have rights, responsibilities, and concerns that directly contribute to the production of a fair trial overall. The state, the accused, victims, witnesses, and society all play a specific role in the execution of fair trials. This section will primarily focus on the rights and roles of the state and the accused, but it is important to acknowledge the other roles without which a fair trial would not be possible.

First, the concept of a fair trial in the United States is provided for in the Sixth Amendment to the United States' Constitution. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state… and [the right] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (US Const. amend. VI)

The Sixth Amendment forms the basis of criminal proceedings for the nation as a whole. However, it is at the state level where more protections, rights, and responsibilities are both enumerated and guaranteed. This distinction is important because criminal proceedings, and thus criminal trials, are largely conducted on the state and local levels. Yet, the Sixth Amendment provides the foundation for the United States' criminal justice system, with the primary purpose being to guarantee basic rights to those accused of crimes. In fact, states cannot restrict these rights, they can only expand upon them.

A critical aspect of the Sixth Amendment, and our criminal justice system at large, is that it was created with the innocent man or woman in mind. Rather than create a system which is intended to prove the guilt of the accused, or requires the accused to prove his innocence, our system favors the accused. The accused is always presumed innocent until proven guilty beyond a reasonable doubt. This, presumably, makes it possible or even favorable for an innocent man or woman to have their name cleared by way of legal proceedings in a system that was developed to protect the innocent. Thus, a fair trial is one in which the accused is not presumed guilty until factual evidence makes it clear that he/she is truly guilty. Unfortunately, this is not always the case, and a fair trial requires more than the presumption of innocence. "The fair trial right also protects the innocent man from an erroneous verdict of guilt, though its safeguards highlight factual innocence ('I didn't do it') more than normative innocence ('I did it, but I did not thereby offend the public's moral code')" (Amar 643).

1.1 Principles of the First Portion of the Sixth Amendment

The Sixth Amendment must now be broken down into two portions, and these two portions must also have their principles individually examined. The first portion is the initial sentence of the Sixth Amendment, which is far more complex than it appears. It contains three principles which are echoed in the constitutions of most states, including that of Texas. In writing, these principles state that they are rights of the accused in all criminal proceedings. However, they do far more than just serve as benchmarks to ensure a fair trial for the accused. They restate founding concepts of this country that are intended to protect the accused in addition to holding the state and government accountable.

The first principle of the first portion is that the accused shall enjoy the right to a speedy trial. This principle has three purposes, which have been identified by the American Bar

Association as: (1) To force a timely trial for the accused; (2) To further public interests for a fair, accurate and timely resolution; (3) To secure effective use of resources ("Speedy Trial"). The speedy trial principle is not meant to dispose of criminal cases as fast as possible, but to ensure that accuracy and fairness are appropriated in a timely manner. In addition to ensuring accuracy and fairness, guaranteeing a speedy trial requires that there be oversight of the courts and serves as one of the many forms of checks and balances.

While some criminal trials may require more time to resolve, whether due to severity, complexity, establishment of facts, or a plethora of other reasons, delaying trials beyond a reasonable amount of time is inexcusable. Interestingly, a defendant cannot waive their right to a speedy trial, but this right can be forfeited. According to the Speedy Trial Act of 1974, "While a defendant cannot unilaterally waive his rights under the Speedy Trial Act, he can forfeit his right to obtain a dismissal of the case for a claimed violation of the Act by failing to move for dismissal prior to trial" (Speedy Trial Act of 1974). Therefore, this right is not one that can be simply given up by the defendant. However, if the defendant does not recognize that his rights have been violated and fails move to have his/her case dismissed prior to commencement of trial, the courts consider this right forfeited. With effective counsel, this conundrum would likely be avoided. Even so, in the interest of conducting truly fair trials, it does not seem just nor fair for the defendant to be responsible for holding the court to its legal duties. Rather, such oversight should come from an external source or the court should be required to disclose that they have violated his right and allow him/her to seek recourse.

Criminal proceedings, by their nature, are lengthy processes that seek to establish facts and then apply the law to those facts. However, unnecessarily extending the amount of time taken is an injustice to all who have time invested in the process – the accused, the state,

witnesses, and society. The speedy trial principle is an important element to fair trials because it ensures that all parties are being treated with respect regarding their time (of which we have so little) and serves as a reminder that human beings are not only delivering justice but receiving it as well.

The second principle of the first portion is that the accused shall receive a public trial. This goes hand in hand with the first principle and is an additional effort to ensure that citizens are not abused by their government. This principle, a necessity to the country's founders, is intended to prevent secret trials and other nefarious affairs. Secret trials were often held during the Spanish Inquisition, in the English Courts, and under the French monarchy ("Annotation 3"). As such, the federal government and every state vehemently protect the right to an open and public trial for all criminal proceedings.

While the primary intent is to provide for open and transparent adjudication, there are several more reasons that a public trial is necessary for conducting a fair trial. Some of these reasons are identified as, "To assure the criminal defendant a fair and accurate adjudication of guilt or innocence, it provides a public demonstration of fairness, it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality" ("Annotation 3"). Public trials ensure that defendants are not mutely sentenced due to bias without all relevant facts providing evidence beyond a reasonable doubt. For if the public witnessed such a situation, they would have means of recourse and could help to remedy the injustice.

Crimes frequently have human victims who are on the direct receiving end of criminal acts. However, in criminal trials, it is not Victim vs. Alleged Criminal, it is State or United States vs. Alleged Criminal. The state takes the place of the victim, and in fact takes the place of society, as many crimes are also crimes against all citizens. Defendants are notified of state

actions against them by way of an indictment for felonies or information for misdemeanors. These will be discussed later, but it is important for this purpose because this represents the point at which the state takes the place of the victim and society in criminal proceedings. With victims and society essentially taking a backseat role in a trial, having trials open to the public ensures that these parties are able to attend and witness justice being rendered. Therefore, the right to a public trial is not only a right for the defendant, but also a right for the victims and society as a whole and its protection is critical to facilitating fair trials.

With the innocent man/woman held as the paradigm of our criminal justice system, it is important to discuss why a public trial would benefit him/her as well. According to Akhil Reed Amar, "He has nothing to hide, and indeed, wants only to clear his name in open court, with the bracing sunshine of publicity helping to dry off the mud on his name" (Amar 677). Indeed, an innocent defendant would not have anything to hide, and a public trial would allow for this person to profess their innocence to the state, victims, and society. Public trials benefit the innocent particularly well because they allow the accused to clear his/her name in full view of the population. For example, in a criminal trial that was not public a man/woman found innocent would still face scrutiny from the public as to why they were found innocent. Was there a bribe? Did they lie? Whereas a public trial allows for transparency in the reasoning behind clearing one's name, a less-than-public trial simply muddies the waters.

It is thus clear that a public trial is beneficial for the defendant, the victims, and society at large. However, the Third Circuit Court of Appeals in United States vs. Kobli upheld that the right to a public trial could be waived by the defendant (Sullivan 256). Therefore, to our government, the right to a fair trial belongs to only the accused. This, I believe, is at odds with what appears to be a major component of fair trials. A fair trial is one in which being public is a

requirement, regardless of waiver by the defendant. The innocent man/woman would have little reason to deny the public entry into trial, and waiver of this right effectively robs the state, the victims, and society of what appears to be their right as well. If secret trials are unfair, then allowing any party to create what appears to be a secret trial would render the entire trial unfair.

Interestingly, a public trial does not require that anyone and everyone who wants entry be admitted into the court. Rather, according to West Law, "The requirement is met if a reasonable proportion of the public is permitted to attend on an impartial basis" (Vernon's Annotated Constitution 3). Often, only a small portion of the public and media are admitted into the courtroom. However, their presence is not only a representation of the public at large, but they often disseminate information about the trial to the general public.

The last principle of the first portion of the Sixth Amendment is the right to have a trial by an impartial jury of the state. This principle is essentially two tied together – the right to a jury trial and a requirement that the jury be impartial. By requiring a jury, the defendant has additional protections against tyranny by the state. The government is unable to pass down its own judgement, and instead this power is given to the American people.

From this, it appears that this principle is once again not just a right of the defendant, which it primarily is, but it is also a right of society. As a democracy, the public is afforded certain rights and privileges that are not present in other forms of government. By allowing society to judge its own, members of the public are afforded an opportunity to directly participate in government and make decisions that are incredibly important to a democracy. A fair trial is one in which a verdict is passed by a jury.

However, a jury trial is only fair when the jury is impartial. A jury predisposed to guilt or innocence cannot render a trial fair, but rather inhibits the execution of justice. Fortunately, in

criminal trials, there is an attempt to mitigate such bias by way of voir dire. Cornell university defines voir dire as, “The process through which potential jurors from the venire are questioned by either the judge or a lawyer to determine their suitability for jury service” (“Voir Dire”). During voir dire, potential jurors are evaluated and questioned in order to determine potential biases and dispositions. In a fair trial, voir dire would be conducted by both the prosecution and the defense together to ensure that a biased juror is not permitted. Unfortunately, many biases may not be implicitly known or recognized by the jurors. This phenomenon, referred to as implicit bias, is the idea that, “People have thoughts and feelings outside of their conscious awareness and control that impact the way they make decisions” (Fox 6). Implicit bias, if present in the court, can infect a jury pool and render an entire trial unfair.

To further explain the principle of the right to a trial by an impartial jury of the state is a requirement imposed by Taylor v. Louisiana. In this case, 53% of eligible jurors in the trial district were female. However, due to an archaic Louisiana law, only 10% of the jurors were permitted to be female. After appealing, Taylor’s case was heard by the Supreme Court. The Supreme Court ruled that an essential component of the Sixth Amendment is the requirement that juries must be comprised of a representative cross-section of the respective community (Louisiana Supreme Court). By requiring a representative cross-section of the community, Taylor v. Louisiana and the Sixth Amendment ensure that both defendant and community are fairly represented during proceedings.

In holding with the idea that the innocent man/woman is the paradigm for our criminal justice system, the impartiality of jury trials must also be briefly examined in that context. Impartial jury trials help to protect, and even favor the innocent man/woman. An innocent defendant would want a jury trial for the same reasons that they would want a public trial. The

hope is that by professing their truth and aligning with the facts, a jury will have no choice but to find the defendant not guilty. A jury will hold the court accountable in the same fashion as the public, and ideally will serve strictly out of a sense of duty and responsibility. Additionally, with a jury trial you essentially have twelve chances to convince just one member of the community that you are innocent. In criminal trials, anything less than a unanimous verdict results in a mistrial. Unfortunately, juries do not always get it right, as innocent men/women have been found guilty and some have even been put to death by a panel of twelve.

Protections exist for jurors, as they do not always get it right. "Jurors cannot be punished or otherwise held legally liable for their decisions" (Gobert 270). Yet, these exact protections also mean there is a lack of accountability for jurors. A sense of duty, responsibility, and impartiality is required for jurors to judge fairly. Anything less renders a trial unfair, no matter the verdict reached.

While having an impartial jury may seem like an equitable outcome favored by all, in practice this is often not the case. In fact, many would claim that a defendant's attorney, as a fiduciary, has a different responsibility. According to James Gobert, "Lawyers would do their clients a not easily explained disservice if they rejected a juror believed to be disposed to their side in favor of one thought to be neutral" (Gobert 271). Defense lawyers, who are officials of the court, are required to uphold the law – and more particularly the constitution. Yet, putting the needs of their clients first also appears to be incredibly important.

Officially, there does not seem to be a requirement to remove jurors who are partial to one's own side, only those partial to the other. Gobert furthers this point by writing:

> It is each attorney's responsibility to discover and to challenge, either for cause or peremptorily, jurors who are biased towards the opposition. There is no obligation to excuse jurors believed to favor one's own side. By the adroit use of challenges, each side strikes those jurors thought to be most partial to the opposition. (Gobert 271)

Essentially, Gobert describes a system, our system, in which it is the responsibility of each respective opposition to keep their opponents in check. This alone is troubling. Rather than both sides working together towards a common goal, the fabrication of a truly impartial jury, each side strives only to keep the opponent from securing an advantage. Trials being viewed essentially as a sporting event, and not as an impartial determination of facts, is outside the scope of this paper, but the analysis of impartiality's effect on fair trials is not.

The question then turns to whether the removal of opposition-partial jurors is the same as having an impartial jury, which has already been determined to be a requirement for fair trials. Gobert describes this conundrum, "The view that an impartial jury will emerge from the elimination of jurors partial to the opposition is based on a questionable equating of impartiality with the absence of partiality" (Gobert 272). In fact, more than just a visible absence of partiality goes into being impartial. Personality traits, education, life experience, and political standing all play a role in one's partiality. This leads back to the process and importance of voir dire, where attorneys can rely on physical cues and body language to help determine the existence of partiality and implicit biases.

Without a truly impartial jury, a criminal trial can never be fair. A jury predisposed to the defendant robs society and the victims of justice and closure. Even worse, a jury predisposed to the prosecution could rob a defendant of his/her freedom and possibly even their life. For a trial to be fair, there must be an impartial jury.

Thus, in analyzing the first portion of the Sixth Amendment, we have the foundation of what composes a fair trial. A fair trial is one in which the rendering of justice is not delayed, the defendant is given a trial as quickly as possible. The defendant is tried in public, regardless of his/her wishes, and portions of the public are invited to attend and disseminate information. The

defendant is tried by a truly impartial selection of jurors, all of whom represent an accurate cross section of the community, and all who are all serving from a sense of duty.

1.2 Principles of the Second Portion of the Sixth Amendment

The second portion of the Sixth Amendment is often seen as a cluster of individual rights that help to further protect the accused from an abusive government. The first principle of the second portion of the Sixth Amendment is, "To be informed of the nature and cause of the accusation" (US Const. amend. VI). According to the government of the United States, this principle, "Entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge" ("Analysis, and Interpretation" 1420). This principle essentially affords the accused two additional guarantees: the opportunity to form a specific defense to a specific charge prior to commencement of trial, and that judgements rendered on specific charges will be res judicata (which is further protected with double jeopardy laws).

When one is informed of the nature and cause of accusations, it is by information for misdemeanors, and an indictment by grand jury for felonies. These official documents describe the nature of the charges and the facts of the case that place the accusation into the statutory definition. If the offense that the accused is charged with is not specifically and clearly described in conjunction with the particular facts of the case, the indictment or information is rendered defective or invalid ("Analysis, and Interpretation" 1420). With a defective or invalid indictment, the accused can move forward with a motion to dismiss.

This principle acts as a safeguard from tyrannical governments that may seek to hold secret trials wherein charges are not conveyed until commencement of the trial. In fact, the

paradigm of the innocent man/woman holds up to this principle particularly well. If the accused is not told what they are being charged with, then it is impossible for them to form a defense that will prove their innocence. In the case of a wholly innocent defendant, Amar writes, "If the accusation is way off base… it may tell the innocent defendant a great deal about where the government went wrong, and how he might go about showing this at trial" (Amar 688).

The second principle of the second portion of the Sixth Amendment is, "To be confronted with the witnesses against him" (US Const. amend. VI). This principle, like the others, is intended to promote the truth and protect the accused from the misdeeds of their government. Secret trials, with their inquisition-like behavior, often relied upon secret witnesses that were not held accountable to their statements. If the accused is to be held accountable, so should the witnesses and all others who are parties to the suit. Fortunately, the court system in the United States is adversarial. This means that both the defense and prosecution are responsible for their own investigations, presenting and cross-examining witnesses, and persuading the jury to interpret the facts of the case to their own benefit. While the adversarial system helps to keep all parties accountable to their statements, it also makes room for hearsay. This principle helps combat the possibility of hearsay, and according to the United States, this principle ensures that:

> The accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. ("Analysis, and Interpretation" 1421)

Essentially, this principle is an effort to protect the accused from erroneous statements that would have to be taken at face value without a witness to validate them. It is much more difficult for a witness to lie under oath in front of a jury than by making a statement that they will never have to physically stand behind. Attentive jurors can pull as much information from body

language and nonverbal behaviors as they can from the verbal statement. Jurors need as much information as possible when making decisions that can, and will, severely impact a life.

This principle stands up to the paradigm of the innocent man/woman exceptionally well. Those who may be inclined to deliberately lie or make false statements about an innocent defendant would be required to withstand the arduous gauntlet of cross-examination. In less malicious instances, such as cases of mistaken identity, fallacious recollection, or any other honest mistake, confrontation is just as valuable. In these cases, the defendant and their counsel are afforded the opportunity to elucidate and correct these mistakes through cross-examination. Echoing this, Amar writes, "[Confrontation will] invite the witness herself to supplement, or clarify, or revise the story, so that the jury and the public may hear the *whole* truth" (689).

The third principle of the second portion of the Sixth Amendment is known as the compulsory process. Like its sister principles, it is an individual right afforded to the accused so that they may be fairly tried in court. In the Sixth Amendment, the principle is written, "To have compulsory process for obtaining witnesses in his favor" (US Const. amend. VI). The term "compulsory process" is vaguer than most previous principles. For our purposes, it is defined as, "Not only a subpoena, which is a command to appear at a particular time and location to provide testimony upon a certain matter, but also a bench warrant, which is a written order commanding a law enforcement officer to seize the person named and bring that person into court" ("Compulsory Process").

Historically, this principle's intended purpose was to make invalid a common law practice that prohibited defendants accused with a felony from bringing forth witnesses in their own defense ("Analysis, and Interpretation" 1667). Somewhat obviously, such practices are not only unjust, but unfair in that they prevent the accused from forming an adequate defense. This

principle builds off many previous principles in that it allows for the accused to provide *their* evidence in *their* speedy public trial in front of an impartial jury. Without it, the adversarial system would not be possible nor would a fair trial.

The right of a defendant to compel *anyone* to appear and testify in court or otherwise be held in contempt is extremely powerful. Yet, this principle is balanced fairly in that neither the prosecution or the defense can arbitrarily subpoena or warrant another entity. In fact, its purpose is to force a reluctant witness to testify to promote the perseverance of factual evidence that is material to the case. In this regard, the power to compel another to testify is balanced equitably between both the defense and the prosecution. Amar writes, "The idea is to enable defendants to benefit from the balance that the state tries to strike when its own evidence-seeking self-interest is at stake" (699). However, abuses of such power to delay or to derail proceedings seems likely. To prevent such abuse, judges hold the ultimate power in granting or denying these subpoenas and warrants and only issue them when a defense can show that witnesses' evidence is material, that the defense cannot go to trial without said testimony, and that the defendant cannot pay witness fees (Christian 32). This check on the powers of both the prosecution and the defense help to ensure this principle is met, and when it is met, that it is met fairly.

This principle can effortlessly pass the paradigm of the innocent man/woman test with only a brief examination. An innocent defendant absolutely benefits from the ability to compel witnesses to testify, whether or not they wish to. If an entire defense rests on the shoulders of a single witness, whose sole testimony could exonerate a defendant. Whatever the witness's reason may be for not wanting to testify, the innocent defendant's right to a complete and fair trial appears to trump the witness's desire to not speak.

The last principle to be examined, the fourth principle of the second portion of the Sixth Amendment is, “To have the Assistance of Counsel for his defense” (US Const. amend. VI). This entitles all defendants accused of a crime to the assistance of a lawyer and applies the moment they are placed under arrest. Not only does the principle entitle the accused to the assistance of counsel, but it has also somewhat recently been interpreted to mean that the accused is entitled the assistance of *effective* counsel.

Like the compulsory process, this principle is rooted in the correction of historical malpractices. English common law customarily, “Had denied to anyone charged with a felony the right to retain counsel” (“Analysis, and Interpretation” 1668). Such injustice of prohibiting those charged with the most serious of crimes from competent legal representation is inherently unfair, and until the implementation of the Sixth Amendment, minimal protections were in place for those accused with such crimes. In modern American society, this principle is one of the most stringently protected, and even seemingly minor oversight by authorities such as not mirandizing the accused or not informing them of their right to counsel can render evidence and even the whole trial invalid.

The average citizen’s knowledge of the law is only skin deep, whereas attorneys have spent at least seven years in higher education and have completed rigorous testing to be able to practice law. Such distinction was apparent to the early framers, but for over a century and a half, the principle was thought to only entitle a defendant to retaining private counsel. Additionally, according to the website JRank Articles, “The assistance of counsel was a critical element in maintaining an accusatorial system of justice. (An accusatorial system places the burden on the prosecution to establish the guilt of the defendant...).” With the entire justice system of the

United States based on the principle that the accused is presumed innocent until proven guilty, the accused must be afforded legal counsel to defend his or her innocence.

Initially, the right to the assistance of counsel did not entitle the defendant to the right to *effective* counsel. However, in McMann v. Richardson, it was determined that, "The right to counsel is the right to the effective assistance of counsel" ("Annotation 10"). Thus, tests were established, and processes were put into place, to ensure defendants were represented fairly and effectively in all criminal proceedings. In modern times, this principle has been further expanded to include two additional sub principles: the right to retain counsel and the right to self-representation. However, these will not be further explored.

This principle's establishment purely to further the rights of the accused causes it to effortlessly pass the paradigm of the innocent man or woman test. In every conceivable situation, this principle substantially benefits the accused, and even more so the innocent. An innocent man/woman may be able to articulate and describe the circumstances of their innocence, but without an extensive understanding of the law, they may not be able to properly form their defense. With the assistance of effective counsel, the innocent man/woman has a much greater chance to prevail in court and proclaim their innocence to society.

2. COVID-19 AND RESULTING ONLINE TRIALS

2.1 Overview

In early 2020, a new form of coronavirus, COVID-19, began to spread across the United States. By mid-March, the World Health Organization had declared COVID-19 a pandemic, President Trump had declared a National Emergency, and mandatory quarantines were being implemented across the country. The wheels of the United States' economy and society began to grind to a halt as businesses, higher education, and the government were forced to close their doors. Behind these closed doors, transitions were made to online environments to protect citizens and curb the spread of COVID-19.

It is said that crime never sleeps, and unfortunately, this rang true throughout the early stages of the COVID-19 pandemic. Thus, the criminal justice system could not just shut down and close its doors, but it also shouldered the same responsibilities as the rest of the nation – to slow the spread of the new coronavirus. In response, many criminal proceedings were reset and delayed to later dates. However, when it became apparent that the effects of COVID-19 would last longer than a few months, government agencies released guidance and orders that moved many criminal trials online. To later assist in analyzing the fairness of online trials, which have been facilitated in response to COVID-19, this section will concisely explore details of the novel coronavirus and then the specific actions which led to trials being held online.

2.2 What is COVID-19?

According to the World Health Organization, COVID-19 is a highly transmissible and infectious disease caused by a newly discovered form of coronavirus. In general, the disease only causes mild to moderate symptoms, and most people make a full recovery without any treatment

or specialized medicines ("Coronavirus"). However, the somewhat frequent outliers and non-typical cases are what cause COVID-19 to be such a disruptive and dangerous outbreak. Older people and those with underlying conditions or other comorbidities are more susceptible to complications such as pneumonia and organ failure.

According to the CDC, as of March 2021, over 29 million people have been infected with, and half a million have died from COVID-19 in the United States alone ("CDC COVID Data Tracker"). With such staggering numbers that have now eclipsed the U.S. death totals from WWII, it is evident that precautions must be taken and followed to mitigate the impact of the coronavirus. With vaccines now being administered to those who need them most, hopes are that the outbreak could soon be contained and managed. Until then, it is imperative that citizens follow the guidance of medical professionals and the CDC to help slow the spread of COVID-19 and protect those who are most at risk.

To make matters worse, research has shown that the coronavirus does not affect the general population equally. In fact, Native Americans, African Americans, and Hispanics are all at increased risks for both hospitalization and death when compared to their White and Asian counterparts. The specific comparisons are quite staggering: Native Americans are 3.7 times more likely to be hospitalized, and 2.5 times more likely to die; African Americans are 2.9 times more likely to be hospitalized, and 1.9 times more likely to die; and Hispanics are 3.1 times more likely to be hospitalized, and 2.3 times more likely to die ("Risk for COVID-19 Infection"). An extensive overview of why this is the case is not known nor is it within the scope of this paper, but it is important to understand that COVID-19 does not affect all ethnic and racial groups proportionally. The CDC has noted that the discrepancies are not due to biological differences between people or a preference of the coronavirus. Rather, according to the CDC, the

explanations are likely socioeconomic factors such as poverty, discrimination, healthcare access, occupation, housing, and wealth gaps ("Health Equity Considerations").

Thus, COVID-19 can affect everyone, but the effects experienced are not always equal. Some experience increased severity of symptoms due to underlying conditions or other health factors, and large subsections of the population are more at risk for complications, largely due to societal risk factors outside of their control. Additionally, controlling the spread of the new coronavirus and minimizing its impact on American society is beneficial for all citizens. While one person's experience with the infection may be minor, they could unintentionally and unknowingly spread the virus to another person who may not be so fortunate.

2.3 How Did COVID-19 Affect the Texas Court System?

With the effects of COVID-19 and the importance of spread mitigation acknowledged, the steps leading to the implementation of online trials can now be explored. Upon the spread of COVID-19 in the U.S., many states, including Texas, began to issue guidance and orders to their court systems. In the first of such documents released in Texas, the *First Emergency Order Regarding the COVID-19 State of Disaster*, the Texas Supreme Court published several requirements for holding trial proceedings.

The document states that a State of Disaster has been declared in all Texas counties and that effective immediately: all courts must modify or suspend deadlines, allow anyone involved in any proceeding to appear remotely, consider remote statements made as evidence, extend statutes of limitations, and more ("FIRST EMERGENCY ORDER"). The order's sweeping changes paved the way for trials and other court proceedings to move to online venues such as Zoom and YouTube. Shortly after the order's implementation, according to Lowell Brown, "Texas courts held more than 10,000 hearings over the past two weeks… Judges spent a

combined 22,700 hours in hearings with nearly 51,000 participants" (Brown). Rather than having to delay proceedings, which would have added to the severe backlog of cases that must be processed and tried, the courts were able to rapidly adapt and continue to adjudicate their cases.

Following the implementation of the first emergency order, the Texas Office of Court Administration released its own guidance titled, *Guidance for All Court Proceedings During COVID-19 Pandemic*. While similar to the Texas Supreme Court's emergency order, the guidance offered streamlined processes to navigate the challenges of both online court proceedings and the possibility of needing to hold in-person proceedings. This document prohibited in-person jury trials for the remainder of 2020 except in extremely limited and specific circumstances. In such circumstances, the courts were required to follow strict operating protocols relating to social distancing, vulnerable population awareness, screenings, evidence management, face coverings, cleaning, and more (Texas Office of Court Admin.).

Of specific importance for this thesis is the following provision, "In criminal cases where confinement in jail or prison is a potential punishment, remote jury proceedings must not be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor" (Texas Office of Court Admin.). This provision effectively barred online trials in felony cases without the consent of both the prosecution and the defense. However, in misdemeanor cases, consent (particularly by the defendant) was not required for the courts to proceed with an online trial. However, while not accused of felonies, these defendants still have much to lose - in Texas misdemeanors are punishable by up to one year in jail.

As of March 2021, there have been 36 total emergency orders regarding the COVID-19 state of disaster in Texas. Many of these orders have made small changes in addition to extending the ban on in-person trials. Of note, the *Twenty-Sixth Emergency Order Regarding the*

COVID-19 State of Disaster improved upon the consent requirement noted in the earlier published guidance. The document reads, "In criminal cases where confinement in jail or prison is a potential punishment, remote jury proceedings must not be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor" ("TWENTY-SIXTH EMERGENCY ORDER"). The court's recognition of consent as an essential element for online trials, particularly in situations where loss of liberty is possible, aligns with the views held by many that consent be required for online trials. This element is critical for the purposes of this paper, and it will be explored further in the following section.

3. CAN ONLINE TRIALS BE FAIR?

Having completed an analysis of what constitutes a fair trial as well as what COVID-19 is and resulting online trials, this section will explore the overarching question – can online trials be fair during the COVID-19 pandemic? It is possible that COVID-19 may not be a long-term factor, but it is undeniable that it has permanently altered society and the American court system. In an ever-growing technological world, transitioning traditional institutions to hybrid or fully online environments is not only possible, but likely inevitable. Ideally, this thesis will be helpful for understanding what constitutes a fair online trial, particularly when outside factors (such as another pandemic) require that criminal trials be held fully online.

This section will proceed by reexamining each principle described in section one and applying the principle to online trials which have been necessitated by COVID-19 and the information described in section two. Upon applying each principle to an online trial, the goal is threefold – to discover if the principle still holds true at large, to find if the principle still passes the paradigm of the innocent test, and to analyze what factors could obstruct each principle from being satisfied. Upon completion of this section, a broad understanding of what constitutes a fair online trial during the COVID-19 pandemic will be presented in the conclusion.

3.1 Fair Trial Principles During the COVID-19 Pandemic

The first principle analyzed in this paper was the right to a speedy trial. Its importance is to guarantee that those accused of crimes are not forced to wait unreasonable amounts of time for a disposition. Additionally, it is a critical to ensuring that public resources are spent effectively, and it serves as a form of oversight on the courts, thus holding all parties accountable.

Online trials during the current pandemic appear to be a solution, rather than a hinderance, to ensuring that the speedy trial principle is met. As discussed in section two, thousands of criminal trials were reset or delayed at the onset of the pandemic. With government restrictions and public health guidance prohibiting in-person trials, these trials would have been forced to remain suspended without the implementation of online trials. On the other hand, suspending these trials would not necessarily have violated the Speedy Trial Act nor the Sixth Amendment, as the delay was necessary to keep all parties safe and to mitigate the spread of the coronavirus.

However, with the option to hold minor trials online, defendants and the court system can effectively and speedily dispose of minor cases that would otherwise add to the backlog of cases that will need to be adjudicated upon return to normal trial conditions. The speedy trial principle appears to be met, unexpectedly in more than one way. First, it allows those accused of minor crimes to rapidly have their case tried without risking the health of involved parties. Second, by continuing to adjudicate cases, the courts are able to minimize future delays in other cases in which online trials are not possible. When the courts can resume normal operations, they will have fewer cases that will need to be tried, thus resulting on a speedier disposition for cases in which an online trial was not possible. Thus, this principle is generally met, and it appears to benefit all parties, even those involved in separate more serious cases.

The speedy trial principle still largely passes the paradigm of the innocent test when applied to online trials. Innocent defendants want their cases to be tried as quickly as possible. With online trials being an option, innocent defendants are afforded the opportunity to dispose of minor cases during the COVID-19 pandemic. The rapid disposition afforded by online trials allow innocent defendants to lessen the clouds of uncertainty and to move forward without

risking their health in favor of freedom. Innocent defendants accused of more serious crimes that are unable to be tried online also benefit from the speedy trial principle. Their cases may be delayed and reset for unusually long periods of time due to COVID-19, but the courts are able to use the time to dispose of lesser cases. Thus, upon resumption of normal practices, their cases should theoretically be adjudicated faster than would be the case without online trials.

Although unlikely, this principle could be obstructed if online trials prove to be ineffective and unsuccessful in delivering a speedy disposition. Online trials can and will cause issues that are not present in traditional trials. If these challenges delay proceedings further than would be the case by not holding trial at all during the pandemic, then the principle would not be met, and the trial would be unfair. However, it is more likely that most online trials will be successful and will promote speedy dispositions, even for those whose trials will commence post-pandemic. Both the speedy trial principle and its paradigm of the innocent test appear to be met in most situations involving online trials.

The second principle is that the accused shall receive a public trial. The principle's primary purpose is to safeguard citizens from possible abuses by their government. As an assurance to every American that their trial will be transparent and scrutinized publicly, this principle is vehemently protected by the courts. The principle also as acts as a demonstration of fairness and it discourages perjury and other misconduct. This principle is important not just for the defendant, but also for society, the courts, and victims. With this principle having such a wide impact, it is more than just the right of the defendant – it is a right for all. However, as discussed in section one, the U.S. government believes that this right is that of the defendant, and as such it is possible for a defendant to waive it. While not the purpose of this paper, a fair trial

should always be public. Secret trials are not fair and allowing any party to create a pseudo-secret trial renders the entire trial unfair.

When applied to online trials, the publicity principle still holds true. With online trials often being held for less serious crimes, it may seem as if having a public trial would be less critical than in serious crimes. However, to the victims and the community the trial may still hold significant importance. Trials need to be held in view of the public, the venue in which the trial is held is irrelevant.

During in-person trials the public is always admitted, although, sometimes in a limited capacity. This is to ensure order in the courtroom and to provide the prosecution and defense an organized and undistracting environment in which to work. With online trials, it seems as if even more of the public could be admitted, which would serve to further promote the public trial principle. Speaking and interacting can be disabled for all nonparticipants, which effectively serves the same purpose as limiting the amount of the public allowed into a courtroom. More citizens would have the opportunity the indirectly participate in the criminal justice system and their government and could do so with minimal impact on their daily lives. While some may shudder at the thought of hundreds or even thousands of people viewing a court proceeding, it still serves to promote the principle and thus a fair trial.

The public trial principle also appears to pass the paradigm of the innocent test. Online trials seem to have the potential to become more secret than a traditional in-person trial. All parties minus the defendant could potentially participate from their own homes, out of the direct view of the public. A truly innocent defendant would likely welcome the oversight that could be provided by the public and media. The public can act as a shield for the defendant against inquisitive acts of the government, and online platforms make it easy for the public to attend. In

addition, the truly innocent defendant has the opportunity to make known their innocence in front of the masses. Clearing one's name in transparent view of the public offers a sense of legitimacy that would be found in a closed trial.

A possible factor that could inhibit the public trial principle from being met in online trials is if the public attendees are able to interject, interfere, or impose upon the trial in any way. Having a large number of less-informed participants able to influence the jury would immediately render the trial unfair. However, in the vast majority of situations, the public trial principle appears to be met and the paradigm of the innocent test passed when applied to online trials during the COVID-19 pandemic.

The third principle, and the last of the first portion of the Sixth Amendment, is the right to have a trial by an impartial jury of one's peers. As discussed in section one, it is seemingly two principles tied together – the right to jury trial and a requirement that the jury be impartial. This principle further protects the defendant by assuring him/her that the government cannot render its own judgement. Rather, the power of sanction is granted to a representative cross section of the community. This leads one to believe that this principle is not just the right of the defendant, but also a right of society. In our democracy, members of the public have both an opportunity and a duty to serve as jurors when called upon. Any infringement on this principle robs not only the defendant, but also society from participating in a fair trial.

The question of whether this principle is met when applied to online trials is much more convoluted than the previous two. With a truly impartial and attentive online jury, whose members were selected based upon *true* impartiality, it would appear to be met. However, this is likely not the case in many circumstances.

The first major issue with the impartial jury principle being met is due to the process of voir dire. As discussed in section one, voir dire is a critical process in criminal trials that allows both the prosecution and defense to remove jurors that they may believe to be biased from the jury pool. This incredibly important step is intended to promote the creation of a truly impartial jury that will determine the outcome of a trial fully on the facts presented. During voir dire, attorneys or the judge question possible jurors to assess their competence and possible biases. In many cases the assessors rely on body language and mannerisms to evaluate potential jurors beyond just their spoken words. These nonverbal cues can help the assessors to determine if implicit biases or deeply ingrained prejudices are present.

According to the information discussed in section two, court processes and proceedings are to be held remotely. Thus, voir dire would almost certainly be held online to help prevent the spread of COVID-19. Holding voir dire online almost completely removes the assessor's abilities to detect and evaluate nonverbal cues and body language. Missing even the smallest movement or indication could potentially lead to the admittance of a juror who is intentionally or unintentionally bias. Even one partial juror admitted in this way could render an entire trial unfair. While it is important to strike a balance between pandemic mitigation and ensuring a fair trial, for online trials the process of voir dire must be rethought to promote an equitable outcome.

The second major issue with the impartial jury principle is that online trials may disfavor potential jurors of lower socioeconomic status, thereby may not accurately representing a cross-section of the community. Most Americans have basic access to technology, such as owning a smartphone or a personal computer. However, these amenities are in no way guaranteed to citizens and there are other costs associated with owning these devices such as Wi-Fi or a data plan.

If a trial is held in a local community where the median income level is lower than average, it is to be expected that some potential jurors may not have access to the technological mediums that would be required for online trials. To simply seek out other jurors who have the means to participate would seem to disregard representing an accurate cross-section of the community. This is both a violation of law and the impartial juror principle. Finding a solution to this issue is not as easy as it may seem. If the courts were to lend out the necessary equipment, no matter the precautions, this could possibly expose the jurors and court officials to COVID-19. This is complicated further by the information in section 2 regarding the disproportionate risk of health complications to minorities. If these jurors are racial minorities, they are also exposing themselves to risks that are unequal to that of other potential jurors.

However, if these issues can be addressed and solved, this principle appears to pass the paradigm of the innocent test when applied to online trials. A *truly* impartial jury is always beneficial for an innocent defendant. When presented with the innocent defendant's truth and the alignment of facts, the likelihood of the impartial jury finding an innocent defendant innocent is extremely high. Of course, juries sometimes get it wrong, but this is hedged against when all principles are met, and the trial is rendered fairly. Additionally, an impartial jury is further beneficial to an innocent defendant because they hold the court and prosecution accountable. An impartial jury serving out of a sense of duty and responsibility will not tolerate misdeeds by the court.

The fourth principle of the second amendment, or the first of the second portion, is the defendant's right to be informed of the nature and cause of the accusation. The information principle affords the defendant two guarantees: the opportunity to form a specific defense to a specific charge prior to trial, and that judgements rendered will be res judicata. The principle

again protects defendants against tyrannical governments and the abuse of secret trials. Without knowing what one is accused of, it is impossible to form an effective defense.

The information principle is still met when applied to online trials. In fact, it appears that the principle does not differ when applied to in-person trials vs online trials. The accused still must know the charges they face and the nature of the crimes. The medium of the trial has little to no impact on the principle being met. By simply detailing the charges to the defendant, the defendant and his counsel are able to form an adequate and specific defense.

The information principle also continues to pass the paradigm of the innocent test when applied to online trials. The innocent defendant benefits immeasurably by knowing the charges against him/her. Once again, the trial venue seems not to matter. By knowing the exact charges and the circumstances surrounding them, the innocent defendant may be able to determine where the government or the accusers are wrong and show this error in trial. In no way whatsoever would an innocent defendant benefit by not knowing the charges against them.

There is but one apparent issue with this principle being met during online trials. If the accused is not notified well in advance that the trial will be online, it could majorly hinder their defense. The way in which evidence is presented, witnesses are examined, and how the jury is addressed varies greatly between in-person and online trials. However, as discussed in section two, defendants must both know about and consent to an online trial. Therefore, there is little to no chance that a defendant would be put in a position to be surprised by an online trial. During online trials, the information principle is unequivocally met and there is no question that it passes the paradigm of the innocent test.

The fifth principle, or the second of the second portion, is the accused's right to be confronted with witnesses against them. In holding with a common theme, the principle is

intended to promote truth and protect the accused against a tyrannical government. The principle historically protects against secret witnesses, which were often used in secret trials. Additionally, with the accused being held accountable for their actions, the principle makes sure that the witnesses and accusers also are held accountable to their statements and accusations. The confrontation principle ensures that the jury and the defendant do not have to accept statements at their face value, but rather allows them to be tested by cross examination and questioning.

The confrontation principle is still met when applied to online trials. Witnesses and accusers must still be able to be confronted, no matter the trial medium. In addition to being a principle that allows the defense to cross examine witnesses, the principle also gives jurors an opportunity to make their own judgement on statements made. Without confrontation, witnesses' statements would just be just that – statements from behind a screen. However, confrontation gives a face and personality to the statements. It is the juror's job to determine guilt or innocence, and the principle gives them another tool to do so.

This principle also continues to pass the paradigm of the innocent test. Those who may intend to make false statements or commit perjury know that they will be held accountable. An innocent defendant would always want the truth, proof of their innocence, to prevail. While it may be easier to lie from behind a screen, witnesses still must withstand cross examination and put their own reputation on the line. It also passes the test in cases where there is no perjury, but rather an honest mistake like mistaken identity. Confrontation allows the defense of an innocent defendant to bring these mistakes to light and correct the problem.

A possible issue with the confrontation principle in online trials is that the jury and attorneys are not able to decipher body language for additional information. The witness or accuser is just a face on a screen. Their mannerisms, ticks, and behaviors can be concealed and

thus knowledge may remain hidden. This issue is not easily solved, and it is a risk that all trial participants must acknowledge and consent to. However, the confrontation principle is still met to a significant degree, and the paradigm of the innocent test passed in the majority of situations.

The sixth principle, or the third of the second portion, is the compulsory process. The principle allows the accused to compel material witnesses in his/her favor, even if they are reluctant to testify. Compulsion appears in the form of subpoenas or bench warrants, and they legally order an individual to appear regardless of their wishes. The principle is an essential element of the compulsory process, without which defendants may be unable to provide *their* evidence of *their* innocence. The principle may be the right of the defendant, but the power of issuing said subpoenas or bench warrants ultimately resides with the judge. This helps to ensure that the power is not abused and that the requested testimony is material to the case.

The confrontation principle once again seems to be met when pertaining to online trials. The venue again seems not to matter. In fact, in theory, it would be easier for a compelled party to appear remotely rather than in-person. The ability for witnesses to appear in trial from anywhere in the world helps to ensure that the compelled party's time is also respected, thus promoting fair trial ideals. In an online trial, the defense may find it harder to persuade the jury in their favor. Compelling witnesses to appear only helps to strengthen the defense and the disseminate relevant facts to the jury and judge.

The confrontation principle effortlessly passes the paradigm of the innocent test, even when applied to online trials. An innocent defendant may have a difficult time providing evidence of their innocence. By adding this tool to the repertoire of defense counsel, the innocent defendant is afforded every opportunity to prove their innocence. In cases where there is minimal

evidence, the testimony of a reliable and knowledgeable party can be the difference between sanctions and exoneration.

A possible issue with the confrontation principle being met in online trials is once again one of required technology. The compelled witness may not have the technological means to participate remotely. In such cases it is unclear whether the responsibility for providing means to testify lies with the court system or with the defense. This issue would need to be explored further to ensure that the defense is able to speak their truth without putting the witness and others at risk.

The final principle entitles the accused to the assistance of counsel in their defense. The principle is applicable from the moment of arrest and remains in effect for the duration of the trial. Additionally, in the last several decades the principle has been determined to also entitle the defendant to the assistance of *effective* counsel. The principle is intended to correct a historical wrong in which offenders were often denied the right to counsel, thus leaving them to defend themselves in criminal trials. In almost every circumstance, the defendant's knowledge of the law is only skin deep. They would be unable to effectively represent their best interests without assistance, and as such the principle is one of the most stringently protected.

The assistance principle is largely met when applied to online trials. The accused's knowledge of the law is independent from the trial setting. As such, the assistance principle is also independent of trial medium. If anything, the need for defense counsel is furthered by online trials in which the defendant would be less likely to demonstrate the facts pertaining to their innocence. Additionally, with consent being a required element of online trials, a defendant must carefully think and be advised on if it is in their best interest to have an online trial.

Once again, the assistance principle passes the paradigm of the innocent test. An innocent defendant needs the assistance of counsel. The facts or application of law are incorrect when there is an innocent defendant accused of a crime. To discover the facts surrounding the mistake is no easy task, and a competent defense attorney is best qualified to handle such a daunting task. The innocent defendant has almost nothing to lose by retaining effective counsel, yet, they have everything to lose by not.

A possible issue with the assistance principle when applied to online trials is that it is much more difficult for counsel to be *effective*. Currently, the concept of online trials is still extremely new. As such, there are no experts on online trials. A usually competent and effective defense attorney may not have the skills nor experience to properly handle an online trial. With time and experience, this issue will be mitigated. However, currently it is much more difficult to ensure that a defendant in an online trial is in fact receiving effective counsel. Without effective counsel a trial is unfair. Thus, it will be a matter of time and practice before the dangers of ineffective counsel are alleviated.

CONCLUSION

In conclusion, online trials during the COVID-19 pandemic are problematic, yet it is certainly possible for them to be fair. Each of the seven principles discussed in this paper were able to be met when applied to online trials. However, each of the seven also had possible issues that could occur that would render the principle unmet and thus the trial unfair. With current technological trends, it is likely inevitable that more trials will continue to be held online – even without pandemic conditions. It is in the best interest of both American society and our criminal justice system to explore the challenges of these trials further to ensure that trials remain fair for all parties involved.

A major finding of online trials during the COVID-19 pandemic in this paper was the element of consent. Online trials do present additional risks for defendants and the court system than traditional trials. There is no way to ensure that these risks are avoided or will be fully known, especially in the early stages of holding trial online. Therefore, it is critical that both the prosecution and the defendant acknowledge these risks and consent to holding trials online in light of these risks. With the consent of all parties, online trials can be held and the primary focus can turn to best ensuring that the trial remains fair and justice is rendered properly.

During the COVID-19 pandemic and similar future conditions that necessitate online trials, the justice system must continue to work to prevent backlogging additional cases. However, each of the principles detailed in this paper must also be considered and weighed according to the severity of the crime and possible punishment. With consent, the courts, defendant, society, and the victims can be assured that the fair distribution of justice remains a top priority even during uncertain external conditions.

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